United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7646

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

75-7668
75-6132
75-6140

B P/S

GEORGE RIOS, et al.,

Plaintiffs-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U. A.

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BRIEF FOR DEFENDANT-APPELLEE ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A.

STATEMENT OF ISSUES

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN AWARDING BACK PAY WHERE TO DO SO WILL DESTROY THE UNION AND THEREBY DESTROY THE AFFIRMATIVE RELIEF PREVIOUSLY DECREED BY THE DISTRICT COURT.

II. ASSUMING BACK PAY WAS PROPERLY AWARDED AT ALL, DID THE DISTRICT COURT PROPERLY RESERVE THE RIGHT TO MAKE A PRO RATA REDUCTION OF CLAIMANTS' AWARDS SO AS TO ENABLE THE UNION AND THE AFFIRMATIVE ACTION PLAN TO SURVIVE AND CONTINUE.

PRELIMINARY STATEMENT

Defendant-appellee (and cross-appellant) Enterprise Association Steamfitters Local Union 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (hereinafter referred to as "Local 638" or the "Union"), cross-appeals from the order (Appendix at 777)* of the Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York, signed on October 9, 1975 and entered on October 17, 1975 (hereinafter referred to as the "Order", which Order granted back pay to certain

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*Hereafter, citations to the Appendix will be in the form "A- ".

members of the plaintiff class of non-whites. This Order was entered in accordance with Judge Bonsal's Opinion on back pay (A-768 et seq.) rendered on June 27, 1975, which is officially reported at 400 F.Supp 988 (hereinafter referred to as the "Back Pay Opinion"). In a previous Opinion, (A-580 et seq.) officially reported at 360 F.Supp. 979 (hereinafter referred to as the "Trial Opinion") and an Order entered pursuant thereto (A-566 et seq.) the district court ruled that the Union had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (hereinafter referred to as "Title VII" or the "Act") and ordered extensive affirmative relief, while at the same time reserving for subsequent determination the issue of back pay.

This action was initiated by the filing of a complaint (A-15) by the Rios plaintiffs, alleging employment discrimination by the Mechanical Contractors Association of New York, Inc. (hereinafter referred to as "MCA"), the Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Educational Fund (hereinafter referred to as "JAC") and the Union. Shortly thereafter, the United States of America filed suit against four local unions in the construction trades serving the metropolitan New York region, and their counterpart apprenticeship committees and employer

associations. Separate trials were ordered for each local union and its counterparts, and the government action against Local 638, JAC and MCA was consolidated for purposes of trial with the Rios action against the same defendants.

A non-jury trial was held before Judge Bonsal and resulted in a finding of discrimination and an Order requiring affirmative action to increase non-white membership in the Union. The district court's findings of fact and conclusions of law were affirmed by this Court in Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (Judge Hays dissented as to quota relief) and the case was remanded for recalculation of the percentage goal. An appeal taken by the Union from the Affirmative Action Plan was stayed pending resolution of other issues.

The district court denied as untimely an attempt by whites to intervene in this case; that decision was affirmed by this Court on the different ground that the applicants to intervene had no substantive rights to assert herein. Rios v. Enterprise Association Steamfitters Local 638, 520 F.2d 352 (2d Cir. 1975) ("Intervention Decision").

Upon remand the district court reduced the percentage goal (400 F.Supp. 983 (1975)), awarded attorneys' fees* (400 F.Supp. 993 (1975)) and rendered a decision

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*The district court's award of attorneys' fees has been appealed by the Union (and a cross-appeal was filed by the attorneys for the Rios plaintiffs) and is presently before this Court.

(400 F. Supp. 988 (1975)) and issued an Order (A-777) as to back pay.

Following the entry of the district court's Order awarding back pay, timely appeals were taken therefrom by the Rios plaintiffs and by the Equal Employment Opportunity Commission (which had been substituted for the plaintiff United States in the government action). Cross-appeals were timely filed by the Union.

Thereafter, Local 638 moved this Court to dismiss the appeals on the ground that they were taken from a non-final order. Concurrently, appellants Rios and E.E.O.C. moved this Court for permission to seek nunc pro tunc certification from the district court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure or in the alternative, pursuant to 28 U.S.C. §1292(b). This Court granted appellants permission to seek such certification from the district court, and on February 23, 1976 Judge Bonsal granted certification pursuant to 28 U.S.C. §1292(b). Shortly thereafter, after petition to this Court pursuant to Rule 5 of the Federal Rules of Appellate Procedure, this Court granted permission to appeal.

This brief shall serve as appellee's brief in the cases of George Rios, et al. v. Enterprise Association Steamfitters Local 638, et al. (Docket Numbers 75-7646 and 75-7668) and E.E.O.C. v. Enterprise Association Steamfitters Local 638, et al., (Docket Numbers 75-6132 and 75-6140).

STATEMENT OF FACTS

Local 638 is a labor organization whose jurisdiction consists of the five boroughs of New York plus Nassau and Suffolk Counties, New York, and whose members perform steamfitting work within this geographic area. The Union has two branches: a construction or "A" branch, whose members are journeymen and perform construction work; and a metal trades or "B" branch, whose members do work in shops and/or do repair work. The total membership of the Union's construction branch (including both working and retired steamfitters) was approximately 3,644 in 1960 and was an estimated 4,198 in 1972. Trial Opinion, 360 F.Supp. at 984; A-586-587. The Court found that membership size was aimed at preventing an oversupply of steamfitters and to advance job security; A-590-591; A-380-381.

MCA is a trade association of approximately 60 mechanical (heating, ventilating and air-conditioning) contractors, and its members employ the major share of the steamfitting labor force in the New York area. Trial Opinion, 360 F.Supp. at 985; A-588-589. MCA represents its members in labor relations matters with the Union, including collective bargaining negotiations. Id.

JAC, which operates the apprenticeship program,

was created in 1960 pursuant to a Trust Agreement between the Union and MCA. The eight-member board of trustees consists of four members chosen by MCA and four chosen by the Union. Trial Opinion, 360 F.Supp. at 985; A-589.

The district court acknowledged that steamfitting is a skilled trade and described the skills of a steamfitter as follows:

> "Workers in the construction steamfitting industry are engaged in the installation of refrigeration, air conditioning, heating, ventilating, pneumatic tube, and sprinkler systems in office buildings, apartment houses, power plants, and other large structures. It is the job of steamfitters on these construction sites to connect the various pipes, pumps, ducts, fixtures, and valves that these systems require. It is necessary for a steamfitter to know how to measure, cut, thread, and connect pipe. In addition, it is necessary that at least some of the steamfitters on a job site know how to weld pipe 'in position.' Since incompetent work may necessitate redoing the job or may endanger fellow workers or future occupants of the structure, steamfitters must know and follow recognized safety procedures." Trial Opinion, 360 F.Supp. at 985; A-588.

Additionally, the district court found that the steamfitting industry has "fluctuations and cyclical unemployment." Id., A-590. The district court also found that at the time there was a shortage of construction steamfitters; this finding was apparently based upon the premise that employers had expended substantial sums for overtime. Trial Opinion, 360 F.Supp. at 986; A-591.

The Union consistently explained to the court below that 1971 employment figures were inappropriate to use as a basis for calculating manpower requirements for the industry (and later the Affirmative Action Program) because that was a peak year and a downtrend in the building industry was already occurring. See, e.g., A-563-565 (Union Trial Exhibits). Subsequent history has shown that the Union's analysis of the employment situation was accurate. See, e.g., A-1085-1118.

The Union was an early and active participant in an affirmative action program -- the New York Plan For Training, Inc. (contained in Exhibit U-AD) -- better known as the New York Plan. This program was developed by the State of New York, the City of New York, building trade unions and contractors in the New York area to increase minority employee participation in the construction industry. Of the 800 minority trainee positions created by the Plan, 90 positions were allocated to the Union. The Union placed 81 trainees; as of the date of trial 66 trainees were employed. Although New York City withdrew from the Plan, it did so because an insufficient overall number of trainees were placed; however, this Union has one of the best records under the Plan. The federal government upheld the Plan for purposes of federal contract compliance and the State

continued to finance the Plan. See Trial Opinion, 360 F.Supp. at 988; A-597-598; Rios v. Enterprise Association Steamfitters Local 638, supra, 501 F.2d at 601.

In 1972 approximately 4.5% of the construction branch membership was non-white, resulting in part from the preliminary relief granted in the Government's action; the Court found that black and Puerto Rican persons constituted 25.09% of the total population of the seven counties within the Union's territorial jurisdiction. Trial Opinion, 360 F.Supp. at 985; A-589.

While the district court found that the Union had unlawfully discriminated against non-whites in admission to the A Branch, Trial Opinion, 360 F.Supp. at 989; A-600-601, it specifically found "no evidence that Local 638 or MCA had engaged in purposeful discrimination against non-whites" as regards referral practices. Trial Opinion, 360 F.Supp. at 990; A-602. Indeed, the district court specifically found that there was no formal method of referral of steamfitters for employment. Trial Opinion, 360 F.Supp. at 986; A-592.

With regard to the referral practices, the court below found that:

> "Local 638 does not maintain a hiring hall, nor does it keep formal records of available jobs or of unemployed steamfitters who are seeking work within its territorial jurisdiction. The general practice is for

> steamfitting contractors to maintain steady crews, which are moved from job to job as work on new contracts begins and old contracts are completed. Hiring of men in addition to the steady crews is done directly by some contractors; other contractors hire men through their superintendents and in fewer instances through their foremen." Id.; A-591-592.

Having determined that the Union bore no direct responsibility for the referral practices, the district court concluded that these industry practices, along with the admission procedures of the Union and of the JAC, required the imposition of affirmative relief. Trial Opinion, 360 F.Supp. at 990; A-602-603.

The district court has required the Union to undertake time consuming and costly testing of new applicants, recordkeeping, reporting and correspondence. (See, e.g., A-1161-1162, in which the Administrator explains the doubling of the cost to the Union of the practical exam). The central fact of the case is that the Union is achieving the goals of the Affirmative Action Plan and that blacks and Spanish-surnamed members have been working "in the general order of magnitude of the percentages of the industry at this moment." A-1161; A-1121-1124; A-1206-1208.

The Union, as stated by the Administrator to the district court, has complied with the Affirmative Action Plan during its two-year operation. Thus the report for the

first year of the Plan (ending July 1974) states in part:

> "The Minimum goal[s] of ... non-white membership ... have been met by the Union." A-1121.

The Administrator also stated that:

> "The 'thrust of the Order' has been met. Black and Spanish surnamed persons have been and are being admitted in large numbers." A-1122.

The Administrator's report for the second year of the Plan (ending July 1975) is equally favorable for the Union:

> "I AM PLEASED TO ADVISE YOU THAT THE UNION EXCEEDED ITS PERCENTAGE GOALS NOT ONLY OF THE MODIFICATION BUT OF THE ORIGINAL REQUIREMENT AS STATED ABOVE."* A-1206.

Local 638 is not a profit-making organization. Rather, it is "an association of workers ... supported by dues and other assessments collected from its members to cover expenses ..." Back Pay Opinion, 400 F.Supp. at 992; A-772. The Union has borne virtually the entire cost of the transitory provisions and Affirmative Action Plan decreed by the district court, and will continue to do so.

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*20% goal under prior Order; 18% goal after remand for the year 1975.

In addition, the district court recognized that the Union has limited financial resources. Id.; see also Rios v. Enterprise Association Steamfitters Local 638, 400 F.Supp. 993, 996-997 (S.D.N.Y. 1975) (awarding attorneys' fees).

Judge Bonsal, aware of the recently decided case of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), (see e.g., Back Pay Opinion, 400 F.Supp. at 989; A-771; 400 F.Supp. at 992, n.4; A-776), determined that under the facts of this case an award of back pay to a class was appropriate, and defined that class as:

> "qualified members of the plaintiff class who applied in writing for membership in the A branch and who were discriminatorily denied admission after October 15, 1968." Back Pay Opinion, 400 F.Supp. at 991; A-770 (footnote omitted).

In denying back pay to others, the district court found that such a denial was appropriate because:

> "(1) damages, if any, arising from alleged discriminatory work referral practices are not ascertainable since Local 638 had no hiring hall and there are no accurate records of job openings for the period involved; (2) damages to persons who did not make formal written application to the A Branch are hypothetical; and (3) damages suffered as a result of the apprenticeship program are speculative, and equitable considerations weigh against making these back pay awards since the admission tests used by defendants were registered with the

> United States and New York State Departments of Labor and were adopted by defendants in good faith on the recommendation of experts." Back Pay Opinion, 400 F.Supp. at 991; A-770-771.

In addition, the district court ruled that defendants MCA and JAC would not be liable for back pay. As to MCA, Judge Bonsal ruled that it was not an "employer", 400 F.Supp. at 992; A-773, and that plaintiffs had failed to demonstrate any specific instances of MCA discrimination. Id. As to JAC, the district court found that it had no responsibility for admissions to the A branch of persons already qualified as journeymen steamfitters. Id. Thus, Judge Bonsal ruled that only Local 638 would be liable for back pay, Id., but stated that this was "without prejudice to any claim a member of the plaintiff class may have against an employer." 400 F.Supp. at 992, n.4; A-776.

Judge Bonsal, aware of the non-profit nature of Local 638, and also aware of the Union's limited financial resources, further ruled that:

> "after the determination of all claims ..., upon good cause shown, the Court will review the aggregate liability for back pay awards and its impact upon the financial resources of the Union, and the Court may in its discretion make a pro rata reduction of each claimant's award or provide for payments in installments." Back Pay Opinion, 400 F.Supp. at 993; A-775.

ARGUMENT

POINT I

THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING BACK PAY AGAINST THE UNION. THE EFFECT OF A BACK PAY AWARD WILL BE TO DESTROY THE AFFIRMATIVE RELIEF GRANTED AND THUS FRUSTRATE THE POLICY OF THE ACT.

A. It was Within the Discretion of the District Court to Deny any Award of Back Pay against the Union.

The award of back pay in Title VII litigation is governed by Section 706(g) of the Act, which provides, in relevant part, that:

> "If the Court finds that respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay..." 42 U.S.C. §2000e-5(g) (emphasis added).

The recent Supreme Court decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), defines the discretionary principles by which a district court must be guided in determining whether to award back pay. The

Albemarle decision specifically recognizes that different remedies will be appropriate in different cases. Cf. Franks v. Bowman Transportation Co., ____ U.S. ____, 44 U.S.L.W. 4356, 4365 (March 24, 1976). Moreover, the Court in Albemarle expressly limited itself to the question of whether the district court had abused its discretion in denying any back pay on the grounds that the defendants had acted in good faith, by stating:

> "Whether a particular member of the plaintiff class should have been awarded any backpay and, if so, how much, are questions not involved in this review." 422 U.S. at 413.

It is submitted that the district court herein, by granting back pay to certain members of the plaintiff class, abused its discretion by placing the Union in a position whereby it will be financially unable to implement the Affirmative Action Program, if, indeed, the Union will be able to survive at all as a result of the back pay award.

The Court in Albemarle, supra, sought to measure the district court's decision against the purposes which underlie Title VII. The Court first noted that, as it had observed in Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971), the primary objective of Title VII was to:

> "...achieve equality of employment opportunities and remove barriers that have operated in the

> past to favor an identifiable group of white employees over other employees." 422 U.S. at 417.

Noting that back pay awards would have a prophylactic effect with regard to this purpose, i.e., to cause employers and unions to self-examine and self-evaluate their employment practices, 422 U.S. at 417-418, the Supreme Court then went on to designate a second purpose of back pay awards under Title VII, specifically, to make persons whole for injuries suffered on account of unlawful employment discrimination. 422 U.S. at 418.

Yet the Supreme Court, in establishing the guidelines under which a district court must exercise its discretion, did not hold that back pay must be awarded in each and every case of employment discrimination. Rather, the Court stated that:

> "...given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," 422 U.S. at 421 (footnote omitted).

In the footnote accompanying the above quotation, the Court expressly stated:

"It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons." 422 U.S. at 421, n.14.

In addition, the Court warned that while the courts of appeals must maintain a principled application of the back pay provision, they must at the same time recognize that the trial court will often have a "keener appreciation of those facts and circumstances peculiar to particular cases." 422 U.S. at 421-422.

We therefore submit that, under the holding of Albemarle, it remains within the discretion of the district court to determine whether or not an award of back pay is appropriate under the circumstances of an individual case. The Albemarle decision does not mandate an award of back pay in employment discrimination cases, but merely establishes a framework under which a district court must exercise its discretionary right to grant or deny such an award.

B. The Primary Relief Sought and Obtained by Plaintiffs was Injunctive Relief. An Award of Back Pay Against the Union Would Destroy the Affirmative Action Program and Frustrate the Policies of the Act.

1. Injunctive Relief Was Sought.

The relief sought by plaintiffs herein was primarily

injunctive relief, namely, membership in the Union, admission into the apprenticeship program and work opportunities. Trial Opinion, 360 F.Supp. at 983-984; A-588; see also A-15, 24-25 (Rios complaint); A-115-117 (E.E.O.C. complaint); A-126. By virtue of the court-ordered Affirmative Action Plan, numerous members of the plaintiff class have achieved this goal. In doing so, they have obtained the high wages, employment, and job security which they were primarily seeking. The Administrator of the Affirmative Action Program reported to the district court in his 1974 report that there were 829 black and Spanish-surnamed journeymen, apprentices and trainees in the Union. He continued, stating:

> "As Administrator, I believe this represents a good job of implementing the order in the first year, ... [and that] the 'thrust of the Order' has been met. Blacks and Spanish surnamed persons have been and are being admitted in large numbers." A-1122.

2. Injunctive Relief is More Important than Back Pay in this Case.

A financially incapacitated Union will not be able to continue with the implementation of the injunctive relief ordered by the district court, relief which we submit is more important in the long run than a financial award.

Indeed, given the Supreme Court's statement that the primary objective of Title VII was "to achieve equality of employment opportunities and remove barriers," Albemarle, supra, 422 U.S. at 417, citing Griggs v. Duke Power Co., supra, 401 U.S. at 429-430, the effective and continued implementation of the Affirmative Action Plan should be afforded a much higher priority than a back pay award when the enforcement of such an award would mean the destruction of the Plan.

In Van Hoomissen v. Xerox Corp., 368 F.Supp. 829 (N.D. Cal. 1973), the district court, in denying plaintiff's claim for compensatory and punitive damages under Title VII, had occasion to analyze the legislative history of the back pay provisions of the Act. In discussing Section 706(g) of the 1964 Act, the court noted that:

> "[T]he main purpose of Title VII...was to 'seek to give people an opportunity to be hired on the basis of merit' (remarks by Senator Humphrey in introducing the Civil Rights Bill for debate in the Senate on March 30, 1964, 110 Cong. Rec. 6549)." 368 F.Supp. at 836.

As regards the 1972 amendments, the court in Van Hoomissen, supra, noted that:

> "[T]he Title was again referred to primarily as a tool to ensure that opportunities for employment were in fact equal: it was not described as a punitive measure

against those who frustrated equal employment. 'Most people want to work. That is all...We are trying to see that all of us,..., will have an equal opportunity in employment' (Representative Dent, 118 Cong. Rec. 1866-67, March 8, 1972)." 368 F.Supp. at 837.

Similarly, in Hecht v. CARE, Inc., _____ F.Supp. _____, 6 FEP Cases 1075 (S.D.N.Y. 1973), the court ruled that under the circumstances of that case injunctive relief to end discriminatory practices was more important than financial rewards to the plaintiff class. Cf. United States v. Ironworkers, Local 10, _____ F. Supp. _____, 6 FEP Cases 59, 68-69 (W.D. Mo. 1973); United States v. United Association, Local 24, 364 F.Supp. 808 (D.N.J. 1973).

3. An Award of Back Pay Will Destroy the Union and the Affirmative Action Plan.

The Union's only income is from dues. The inherently limited, already heavily taxed Union treasury is needed for two vital functions which the district court should have considered more important to effectuate the purposes of Title VII than the enrichment of specific individuals. First, the Union must have resources to finance the Affirmative Action Plan or the plan will fail. Numerous secretaries are required to compile the lists and reports, and to send the notices and letters required by the Plan.

Telephone, postage, stationery and paper costs are high, and the practical examinations, given to hundreds of men, costs a great deal of money. Advertising is contemplated, and substantial time is required by Union officers, agents and attorneys to implement the program. A bankrupt or financially crippled Union could not do this.

The Union has borne virtually the entire cost of the Transitory Provisions. The November 1, 1973 affidavit of Mr. John Sheeran, Secretary-Treasurer of the Union, made in opposition to the motion to extend the Transitory Period (annexed to the affidavit of Richard Brook, docket entry dated November 2, 1973 at A-743), depicts the time, effort and money expended by the Union:

> "The Union has gone to extraordinary lengths in terms of time, effort and money to fulfill its responsibilities under the Order and under the various rulings of the Administrator. Several office secretaries otherwise not required, are engaged full time in record keeping and correspondence required by Judge Bonsal's Order of June 21, 1973; most of my time and that of the Business Agents, whose duties according to our Local Constitution require them to attend to steamfitting construction problems in the field, is devoted to the screening of requests for applications, the scheduling of qualified applicants and the reviewing of results of the practical testing. These business agents have been required to spend days and in some instances weeks in assisting this office staff to process the enormous volume of material relating to the aforementioned problems. By a conservative estimate, the Union has already spent over $31,000 during 1973 in connection with the implementation of this Order. This Union cannot function effectively as a collective

> bargaining representative of the steamfitters in the mechanical contracting industry in our territorial jurisdiction if its elected manpower and funds continue to be expended on the transitory provisions of this Federal Court Order." Sheeran Affidavit, pages 1-2.

Since the date of Mr. Sheeran's affidavit, the costs for secretarial assistance, postage, stationery, telephones have continued, as have the cost of administering the examination. The Union's legal expenses are also increased by the problems arising under the Decree, and the drain on the time of the elected Union manpower continues.

The Administrator reported to the district court on January 21, 1974, that prior to that date the following number of people were processed:

> "The union in good faith processed 1608 applications by the end of 1973. All were from the minority group. 850 minority persons were given the complicated and time consuming Practical Examination." A-1124.

See also Intervention Decision, 520 F.2d at 358.

Second, the Union also needs substantial funds to represent its members -- non-whites and whites -- for purposes of collective bargaining and other Union business. The Union requires funds for studies, attorneys and strikes if it is to reach an agreement favorable for employees.

Additional funds are needed to police the agreement, process and bring arbitrations, defend jurisdictional dispute questions with other unions, organize non-union companies, and engage in litigation to preserve the traditional work opportunities for its members. See, e.g., Enterprise Association Steamfitters Local 638 v. N.L.R.B., 521 F.2d 885 (D.C. Cir. 1975). These are the many purposes for which the Union exists. These are the areas in which the Union has excelled. It has achieved a high wage rate, job security and fair working conditions for its members, and it is for these reasons that non-whites as well as whites want to join. See, e.g., A-126. An insolvent Union would lead to a depression of wage rates, worsening of benefits and working conditions and exploitation of journeymen and apprentices -- all to the great harm of the Union members - white and non-white -- and to the advantage of the employers, or to unions which exploit rather than represent workers.

4. Other Factors Indicate that an Award of Back Pay Against the Union is Inappropriate.

In addition to the above factors, other reasons weigh against an award of back pay against the Union. Thus, for example, the district court expressly found that

"there is no evidence that either Local 638 or MCA has engaged in purposeful discrimination against non-whites..." in connection with work referrals. Trial Opinion, 360 F.Supp. at 990; A-602. Indeed, the Union was one of the first participants in the New York Plan. Trial Opinion, 360 F.Supp. at 988; A-597-598. Further the district court has acknowledged the Union's compliance with the directives of the Affirmative Action Plan, A-1135-1136, which compliance has created a great financial strain on the Union. See A-1121-1124; A-1206-1208. Moreover, the Union neither hires nor employs steamfitters and does not maintain a hiring hall. Trial Opinion, 360 F.Supp. at 986; A-591-592; See also A-601-602. Rather, steamfitters obtain work by going to the jobsite or contacting employers, and are hired by the employer's officers, superintendents or foremen, all of whom are agents of the employer. Trial Opinion, 360 F.Supp. at 986, 990; A-592, 602. These factors, when viewed in conjunction with the likely impact an award of back pay will have, amply demonstrate that the back pay award was unwarranted and erroneous.

5. Black and Spanish-surnamed Steamfitters have Already Been Compensated.

In a very real sense black and Spanish-surnamed individuals have already been compensated by the injunctive relief decreed by the district court. This relief has

resulted in, and, if back pay relief is properly denied, will continue to result in, compensation to those black and Spanish-surnamed individuals who are now in the work force and those who will become members of this work force under the Affirmative Action Plan. The real compensation -- wages -- that the district court has afforded these black and Spanish-surnamed individuals the opportunity to earn should not be decreased by the destruction of their collective bargaining representative. A-1208. Given the serious unemployment that presently exists in the steamfitting construction industry, A-1085-1118; A-1122-1123; A-1208, and the depleted Union treasury, appellee submits that an award of back pay against the Union will result in a depression of the wage structure in the industry and the destruction of the Affirmative Action Plan. Under such circumstances the district court's award of back pay should and must be reversed.

6. Back Pay has Usually Been Awarded Against Large Corporations and Not Against Unions.

While appellants correctly note that unions have been found liable for back pay (Brief for appellant Rios at 43-44), it is readily apparent that the instant case bears no factual similarity to the situations existing in the cases they cite to this Court, for in each such case the

union was found to be jointly liable for back pay with the employer. The very names of the employer-defendants involved in those cases demonstrate that the issue of the union's ability to pay did not have to be considered by the district courts. Thus, in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974), where the union was found partially liable for the back pay award, it is obvious that the issue of the impact of back pay award upon non-financial injunctive relief was not reached, since it was Goodyear Tire Co. who bore the financial responsibility for the implementation of the affirmative relief, and that company can well afford to bear such a burden since it can pass on increased costs to its customers. Similar considerations are evident where a defendant is American Tobacco Co. (Russell v. American Tobacco Co., _____ F.2d _____, 10 EPD ¶10,412 (4th Cir. 1975)), United States Steel (United States v. United States Steel, 520 F.2d 1043 (5th Cir. 1975)) and Lorillard Corp. (Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971)). Even in United States v. Bricklayers, Local 1, _____ F.Supp. ____, 5 EPD ¶8480 (W.D. Tenn. 1973), aff'd as modified sub. nom. United States v. Masonry Contractors Assoc. of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974) the court found that

certain employers were to share in the responsibility for a back pay award. 5 EPD ¶8480 at 7324, n.

Appellee herein, unlike United States Steel, Lorillard Corp., American Tobacco Company and other organizations of similar financial means, will simply be unable to continue implementing the Affirmative Action Plan should the district court's award of back pay be upheld without a drastic reduction of said award. In addition, unlike the unions who were found liable for back pay in the cases cited by the Rios appellants at pages 42-43 of their brief, appellee herein was found to be the sole entity found liable for back pay. Under such circumstances appellee submits that the award of back pay constitutes error.

C. Under the Facts of this Case, a Back Pay Award is not Justified.

The Supreme Court decision in Albemarle does not mandate the award of back pay in each and every case. 422 U.S. at 421-422. We respectfully submit that such an award, having the likely effect of destroying the Union and thereby destroying the employment opportunities of minority workers, would frustrate the central statutory purpose of Title VII, i.e., eradicating discrimination throughout the economy.

That the Union's ability to pay for a back pay award is a relevant factor for the District Court to consider can be seen in the Albemarle case itself, where the Supreme Court made frequent reference to the fact that the back pay provisions of Title VII was expressly modeled on the back pay provisions of the National Labor Relations Act. Under that Act, the N.L.R.B. has refused to impose back pay liability upon a union where to do so would imperil the union's ability to exercise its statutory rights or would subject it to inordinate monetary liability. As the First Circuit stated in N.L.R.B. v. Oil, Chemical and Atomic Workers, 476 F.2d 1031 (1st Cir. 1973), a case in which the Board denied an award of back pay against a union:

> "The Board has a long-standing policy against such awards in this type of case, Colonial Hardwood Flooring Co. Inc., 84 N.L.R.B. 563 (1949), grounded in sound policy, Long Construction Co., 145 N.L.R.B. 554 (1963), which it has recently reaffirmed, over dissent, in the fact of contrary recommendations by the General Counsel and the Administrative Law Judge." 476 F.2d at 1037 (citation omitted).

See also Teamsters Local 901 (Lock Joint & Pipe Co.), 202 N.L.R.B. No. 43, 82 L.R.R.M. 1525 (1973); Union Nacional de Trabajadores (Catalytic Industrial Maintenance Co.), 219 N.L.R.B. No. 66, 89 L.R.R.M. 1741 (1975).

Since Congress chose to model the back pay provisions of Title VII upon the National Labor Relations Act back pay provisions, Albemarle, supra, 422 U.S. at 419, and since the N.L.R.B. has refused to award back pay against unions when to do so would imperil their ability to bargain effectively with employers, it stands to reason that the same considerations should apply in the Title VII context. The statement by the Court in Albemarle that "...the Board, since its inception, has awarded back pay as a matter of course...", 422 U.S. at 419-420, was specifically stated by the Court to apply to cases of employer violations of the National Labor Relations Act, no mention being made of a union violation thereof. 422 U.S. at 420. Thus, as Mr. Justice Renquist said in his concurring opinion in Albemarle, a district court, "like the N.L.R.B., must avail itself 'of the freedom given it by Congress to attain just results in diverse, complicated situations'." 422 U.S. at 447 (citations omitted).

We respectfully submit that under the facts of this case the district court was not justified in awarding back pay.

POINT II

ASSUMING, ARGUENDO, THAT AN AWARD OF BACK PAY IS JUSTIFIED, THE CRITERIA ESTABLISHED BY THE DISTRICT COURT FOR SUCH AWARDS SHOULD BE UPHELD AS A PROPER EXERCISE OF THE DISTRICT COURT'S DISCRETION.

While the Union submits that the district court erred in awarding back pay in this case (Point I, supra), should this Court rule that the district court did not err in making such an award, its decision to reserve the right to reduce any back pay award, when viewed in light of the circumstances peculiar to this case, was clearly a proper exercise of the discretion granted to the courts under Title VII. As discussed in Point I, supra, a financially incapacitated Union will simply be unable to continue the implementation of the Affirmative Action Plan or to represent its members. Under such circumstances, the very least that is required under Albemarle is to reduce back pay awards so as to effectuate the implementation of the Plan and to enable the district court to grant relief that is as complete as possible under the circumstances of the case.

In addition to reserving this right, the district court also established criteria under which the awards of back pay to individual claimants was to be made. For the reasons to be discussed below, we submit that the establishment of these criteria, when combined with the reduction of awards, were a proper exercise of the discretion of the district court.

A. The District Court Properly Reserved the Right to Make a Pro Rata Reduction of Each Claimant's Award or to Provide for Payments in Installments.

In Albemarle, supra, the Supreme Court did not negate the inherent discretionary power of the district court. Rather, the Court in Albemarle defined the parameters within which the district court must exercise its discretion in awarding back pay under Title VII. The Court noted that the primary objective of Title VII was to achieve equality of employment opportunities and to remove barriers that stand in the way of such equal opportunity. 422 U.S. at 417. By establishing the Affirmative Action Plan, the district court herein has advanced this purpose, and the implementation of the Plan by the Union serves in great part to eradicate discrimination in this industry. On the

other hand, however, the Supreme Court in Albemarle also stated that a central purpose of the back pay award was to make persons whole for injuries suffered through past discrimination. 422 U.S. at 421. It is respectfully submitted that under the facts of this case both purposes cannot be served at the same time.

By instituting this suit the plaintiffs have sought to acquire employment opportunities in the steamfitting construction industry by becoming members of a union that has in the past acquired high wages and good benefits for its members. See, e.g., A-126; A-188; A-199. In order to accomplish this task, the Union is required to expend large amounts of time, effort and money. The present Affirmative Action Plan constitutes an extreme burden on the financial resources of the union, whose coffers are funded solely by dues collected from its members. Back Pay Opinion, 400 F.Supp. at 992; A-772. Should the Union be compelled to make full payments under a back pay award, the effect would be to force the Union to disband or to so decrease its operations as to become ineffectual.*

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*While this Court's acceptance of interlocutory review under 28 U.S.C. §1292(b) makes it impossible for the Union to specify the exact result an award of back pay will have upon the Union (there being no amount of liability yet determined), any award of back pay that was not subject to drastic reduction by the District Court would have such an adverse impact upon the Union and, in turn, upon the white, black and Spanish-surnamed members thereof.

Obviously, such was not the intent of Congress in enacting Title VII, nor should it be construed as the intent of the Supreme Court in interpreting the back pay provisions of Title VII. The Albemarle decision did not mandate an award of back pay in each and every case; rather, the Court directed district courts to take into account the facts and circumstances of the individual case and thereafter to fashion the most complete relief possible, in light of the policies of the Act. 422 U.S. at 421-422. Indeed, the district court's decision to reserve the right to reduce any back pay award and/or to provide for payments in installments was not only permissible but compelled by the Albemarle decision.

A financially incapacitated Union will be unable to implement the Affirmative Action Plan decreed by the district court. As a result, numerous members of minority groups who might otherwise become Union members working at high wage rates and under good conditions will be unable to do so. In addition, an award that will financially incapacitate the Union will work to the detriment of those black and Spanish-surnamed individuals who have recently become members of the Union, since the Union will be unable to be an effective bargaining agent. This Union, unlike

large corporations, is simply unable to bear such a burden.*

The district court followed the explicit requirement of Albemarle and took into consideration all of the facts and circumstances of the case, including the financial resources of the Union. See Thornton v. East Texas Motor Freight, 497 F.2d 416, 421-422 (6th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 919-922 (5th Cir. 1973); see also Laffey v. Northwest Airlines, Inc., 374 F.Supp. 1382; 1390 (D.D.C. 1974); cf. Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974).

These factors were noted in the Post Trial conference, attended by all counsel, as well as in the court's decisions.

First, Judge Bonsal was aware that unemployment amongst Union members has been severe since the time the Affirmative Action Plan was adopted. A-1085-1118 (uncontradicted evidence showing between 25% and 30% unemployment in 1974); A-1122-1123 (Administrator's report to district court for July 1974). See also A-1141-1142; A-1164-1168.

The situation worsened in 1975. A-1207. (Administrator's report to district court for July 1975). Approximately 40% to 45% of the membership was out of work in 1975

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*The above considerations do not rest solely upon equitable considerations, but rather upon an interpretation of the Albemarle decision, and its recognition of the statutory purposes of Title VII.

and the situation is still deteriorating. A-1174; A-1207, in which the Administrator advised that an apprenticeship class had to be held in abeyance because of unemployment in the industry.

Second, the court below acknowledged that the Union has very limited financial resources. As Judge Bonsal stated:

> "... I don't think Local 638 is in the position of Bethlehem Steel.
>
> Inherently, these things come out of the members of the Union. There is no question about that in my mind. That bothers me a bit. ... I am certainly going to have that very much in mind in what I do, because I do think in all this I am really sitting as a court of equity, and my problem is directed at which I think is fair, and I am going to try to reach that determination." A-1145.

As the district court also stated:

> "I was just thinking what would happen to me if someone was saying there's discrimination against blacks in the judgeship business, therefore I ought to cough up some of my salary five years ago ...." A-1157-1158.
>
> "I will want to consider the Union's ability to pay. I don't know how much these will amount to ... the back pay is coming out of the Union which has come in from contributions of Union members and it isn't the Union members who were charged here with discrimination, it was the Union itself so that it may be on that ability to pay there might be some questions as to whether I will prorate these awards for back pay." A-1178

See also Back Pay Opinion, 400 F.Supp. at 992, A-772.

The last page of the Administrator's second year report to the district court (A-1206) (erroneously not reproduced in the Appendix), explains the Union's financial condition as follows:

> "George B. Buck Consulting Actuaries Inc. issued a report on projected revenues and expenses for the 5-year period 1975 through 1979 at the union's request. This report was issued in April, 1975. The burden of the report is that under the consultant's accepted assumptions and presumptions, the Union will run an anticipated total deficit for the 5-year period of $2,242,000. This they conclude requires them an increase in assessments and dues, in general an increase in revenue."

The Union is going broke, quickly; a back pay award of any magnitude will hasten its demise and make it impossible to recover. Plaintiffs' class will suffer from such a dire result.

Third, Judge Bonsal acknowledged that the Union has been cooperative in implementing the Affirmative Action Plan. As the district court stated:

> "As a matter of equity, since the permanent injunction I have no reason and nothing has been brought to my attention that the Union hasn't been living up to the terms of the injunction and indeed has been most cooperative in resolving this question." A-1175-1176.

It does not frustrate the policies of Title VII for the district court to spare the Union from financial

ruin because of its vigorous implementation of the District Court's Affirmative Action Plan over a two year period.

Fourth, and most important, Judge Bonsal reasoned that if back pay interfered with the Union's ability to function, the Affirmative Action Plan could not continue and the plaintiff class would thereby be injured. As Judge Bonsal stated regarding the Affirmative Action Plan:

> "...I am very happy the way this thing has been going, despite the very serious problem of unemployment,...and I think it has only gone that well because of the cooperation, and I mentioned that, of the Union and everybody here..." A-1143.

See also A-1175-1176; A-1138; A-1157. Cf. Intervention Decision, 520 F.2d at 358.

The same rationale was also expressed by Judge Bonsal in the following language:

> "I don't want to financially cripple or destroy this Union. We don't have to do that, but I want to know what the story is. I don't want to do that. Absolutely, I am trying to be as fair as I know how from your point of view as well as the other points of view and that is my purpose here. I don't think anybody would gain by that. We have gone through this litigation now and we have got an affirmative action program. We have got a fine administrator. We have got a difficult economic situation and we are all trying to live with it and I want to make this thing succeed and that's been my point right from the beginning, from everybody's point of view." A-1182.

Contrary to the contentions of appellants Rios and E.E.O.C., the district court did not erroneously admit

evidence relating to the financial resources of the Union. Such evidence is both necessary and relevant to "locate 'a just result' in light of the circumstances peculiar to the case", Albemarle, supra, 422 U.S. at 424, where, as here, a financially ruined Union would be unable to implement the Affirmative Action Plan, to bargain collectively in a viable manner and to obtain for its members the wages, hours, and terms and conditions of employment which underlie the private plaintiffs' desire to become union members. Were the district court to be compelled to ignore the fact that the Union is not an employer, does not conduct a business for profit and does not have the ability to pay, the district court would be stripped of the discretionary powers granted it under Title VII and would be abrogating its duty to reach a just result and to eliminate, insofar as possible, the barriers to employment it found to exist. The recognition by the district court that the Union does not have the financial resources of United States Steel Corp. cannot and should not be attacked as erroneous.

Moreover, the cases cited by the appellant E.E.O.C. in support of its contention that evidence concerning a party's financial resources is inadmissible are clearly unrelated to the instant case. Brief for Appellant E.E.O.C. at 27. In the cases of Blankenship v. Rowntree, 219 F.2d

597 (10th Cir. 1955), Eisenhauer v. Burger, 431 F.2d 833 (6th Cir. 1970), Stewart v. Mutual Clothing Co., 195 Misc. 244, 91 N.Y.S. 2d 338 (Monroe Co. Ct. 1949), and Wilson v. Onondaga Radio Broadcasting Corp., 175 Misc. 389, 23 N.Y.S. 2d 654 (S. Ct. Onondaga Co. 1940), the exclusion of such evidence was based upon the commonly accepted principle that the introduction of such evidence is prejudicial to the wealthy defendant and will possibly result in a larger jury award due to a defendant's "deep pocket". Thus, the "exclusionary" rule, analogous to the rule precluding the introduction of evidence relating to a defendant's insurance status in personal injury actions, see, e.g., Federal Rules of Evidence Rule 411 and Advisory Committee notes thereto, is based upon the premises that "such evidence tends to inject into the case a[n]...issue which may effectuate prejudicial results." Blankenship v. Rowntree, supra, 219 F.2d at 598. This rule, being intended for the protection of a defendant, should not be utilized to preclude the introduction of such evidence by a defendant.

Additionally, the above cases cited by appellant E.E.O.C. all relate to an award of damages by a jury, whereas the instant case involves the equitable, restitutionary award of back pay by the trial judge, see Curtis v. Loether, 415 U.S. 189, 197 (1974), which award remains

within the trial court's discretion. 42 U.S.C. §2000e-5(g); Albemarle, supra.

The case of Russell v. American Tobacco Co., supra, is clearly distinguishable from the facts of the instant case. In Russell, the court rejected the union's argument that, as between the union and the company, the latter was better able to bear the financial burden of a back pay award and, as a result, the union should not be jointly liable with the company. The instant case, however, presents a totally different situation, since appellee herein will be financially unable to implement the Affirmative Action Plan, to bargain effectively and to strike, if necessary, for improved employment terms (which will benefit all its members, present and future, white and non-white) should the district court herein not drastically reduce any back pay award. The court in Russell was not presented with such a situation, since the company was the party primarily responsible for effectuating the non-monetary aspects of the injunctive relief, and the company was in a financially secure position, able to pass on the costs of compliance to its customers. In addition, appellee herein bears the sole responsibility for back pay, a responsibility that, unlike

large corporations, the Union is financially unable to meet.

Finally, Judge Bonsal stated that the decision to award back pay solely against the Union was "without prejudice to any claim a member of the plaintiff class may have against an employer." Back Pay Opinion, 400 F.Supp. at 992, n.4; A-776. Thus, the district court's decision to reserve the right to make a pro rata reduction of awards will not necessarily preclude members of the Rios class from being made whole. Obviously, the Union should not be held financially responsible for appellants' failure to seek such a remedy from the employers.

Local 638, unlike United States Steel, Lorillard Corp., American Tobacco Company and other large corporations, will simply be unable to survive should the district court's decision to consider a reduction of the back pay awards be reversed. With the demise of the Union will, obviously, come the end of the Affirmative Action Plan. We respectfully submit that consistent with the primary purpose of Title VII, i.e., to achieve equality of employment opportunity and remove barriers to equal opportunity, such a result should not be allowed.

B. The District Court Properly Determined that Potential Claimants Prove that they Applied for Membership in Writing. The Court Below Properly Excluded Claims from those Deterred from Applying, from those Affected by the Work Referral Practices and from those who "Applied" Orally.

The district court, in the exercise of its discretion, granted plaintiffs' motion for back pay as to black and Spanish-surnamed individuals who met certain defined criteria, one of which was that the individual "aplied in writing for admission to the A Branch." Back Pay Opinion, 400 F.Supp. at 991; A-770. (A discussion of the other criteria challenged by appellants follows infra.)

In their briefs to this Court, appellants E.E.O.C. and Rios argue that the above requirement was erroneous (Brief for Appellant E.E.O.C. at 14; Brief for Appellant Rios at 31) and that the district court improperly limited the potential claimants by refusing to grant back pay to persons affected by work referral practices (Brief for Appellant E.E.O.C. at 18; Brief for Appellant Rios at 31), and denying back pay to those discouraged from applying to the A Branch (Brief for Appellant Rios at 32).

Clearly, the contention that back pay should be

awarded to those persons who were discouraged from applying for membership to the A Branch is precluded by this Court's recent decision in Equal Employment Opportunity Commission v. Local 638...Local 28, Sheet Metal Workers, ____ F.2d ____, slip. op. 2481 (2d. Cir., March 8, 1976) in which this Court, faced with the same argument, held that:

> "There is a class of individuals who claims are too speculative for adjudication; those with neither written nor testimonial evidence of application and rejection. Thus, those who never applied to Local 28 or the JAC because of their well-deserved reputation for discrimination are, regrettably, ineligible for back pay." Slip opinion at 2503 (emphasis added).

See also United States v. Lathers, Local 46, 328 F.Supp. 429, 443-445 (S.D.N.Y. 1971), aff'd 471 F.2d 408 (2d Cir.), cert. denied 412 U.S. 939 (1973).

Similarly, the class of non-white members who were allegedly denied jobs as a result of work referral practices is too speculative for adjudication. Cf. United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301, 311 (8th Cir. 1972), cert. denied 409 U.S. 1107 (1973). Indeed, the court below specifically found that there was no formal method of referral of steamfitters for employment, Trial Opinion, 360 F.Supp. at 986; A-591-592, and concluded that as regards work referrals there was "no evidence that Local 638 or MCA had engaged in purposeful discrimination against non-whites." Id. at 990; A-601-602. The Union does not hire steamfitters,

nor does it refer them for hire; thus, the Union is not liable for back pay as to work referrals. See discussion, supra, at 9-10, 24.

Unlike the situation in E.E.O.C. v. Local 638... Local 28, Sheet Metal Workers, supra, where the defendant therein maintained some but not all records of application for membership, in the instant case there was no hiring hall and therefore were no records to be kept. Thus, contrary to appellant's contention that "the effect of the court's rationale is to reward defendants for failing to keep records of their own discrimination," Brief for Appellant Rios at 31, the district court herein properly viewed the losses, if any, sustained as a result of the referral practices as being:

> "not ascertainable, since Local 638 had no hiring hall and there are no accurate records of job openings for the period involved." Back Pay Opinion, 400 F.Supp. at 991; A-770.

Additionally, the court below, in describing the existing practice with regard to work referrals, indicated that it was employers or their agents who hire steamfitters, not the Union. The district court specifically found that:

> "The general practice is for steamfitting contractors to maintain steady crews, which are moved from job to job as work on new contracts

> begins and old contracts are completed. Hiring of men in addition to the steady crews is done directly by some contractors; other contractors hire men through their superintendents and in fewer instances through their foremen." Trial Opinion, 360 F.Supp. at 986; A-591-592.

It is thus apparent that the district court did not err in finding the Union not liable for back pay to those persons arguably affected by the referral practices in the industry.

Finally, appellants argue that it was improper for the district court to condition an award of back pay upon the existence of an objective indication of application to the Union for admission, specifically, written documentation of same. While appellee recognizes that a similar requirement was disallowed in E.E.O.C. v. Local 638...Local 28, supra, we ask this Court to reconsider its prior decision in light of the clearly hypothetical nature of claims that might otherwise be allowed by persons who do not have objective evidence of their application to the Union. A written application for admission, we submit, is necessary to establish that the claimant was in fact interested in Union membership and that he had invested a sufficient amount of time and effort to prove his interest. Ackerman v. Board of Education of City of New York, 387 F.Supp. 76, 81 (S.D.N.Y. 1974); United States v. Lathers, Local 46, supra.

C. The Requirement that Each Claimant Prove Discriminatory Denial of Admission Commencing on the Date on Which the Next Non-Class Member was Admitted to the Union was Correct.

In its Order of October 17, 1975, the district court decreed that back pay would be awarded to those members of the plaintiff class who prove, inter alia, that:

> "He was discriminatorily denied admission to the A Branch after October 15, 1968. Discrimination as to a claimant for purposes of back pay will commence on the date on which the next applicant for membership in the A Branch who does not qualify as a member of the plaintiff class was admitted to the A Branch." A-778.

In establishing this criterion for an award of back pay the district court properly required the claimant to prove not only that he was rejected despite his qualifications, but that some other non-member of the plaintiff class was subsequently admitted to the A Branch. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); E.E.O.C. v. Detroit Edison Co., 515 F.2d 301, 316 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3214 (U.S. October 7, 1975) (No. 75-393).

Absent such proof, the claimant will fail to establish his entitlement to back pay, for he will not have established that his tangible economic loss, if any, was the result of racial discrimination. See E.E.O.C. v. Detroit Edison Co., supra, 515 F.2d at 922; Ackerman v. Board of

Education of the City of New York, supra, 387 F.Supp. at 80; Mims v. Wilson, 514 F.2d 106 (5th Cir. 1975); United States v. Lathers, Local 46, supra.

In addition to requiring proof that a non-class member was admitted subsequent to the date a class member was rejected for membership to the A Branch, the district court stated that:

> "This discrimination for purposes of back pay awards will be deemed to continue until the date claimant was admitted to the A Branch or until June 21, 1973, whichever is earlier." Back Pay Opinion, 400 F.Supp. at 993; A-775.

Clearly, once a claimant was admitted to the A Branch the Union, which does not hire steamfitters and does not operate a hiring hall, 360 F.Supp. at 986, A-591-592, cannot be held responsible for additional amounts of back pay, since at such a time the Union is not engaging in any discrimination. Similarly, once the district court established the criteria for admission to the Union on June 21, 1973, the Union's liability for back pay ended. See Johnson v. Goodyear Tire & Rubber Co., supra, 491 F.2d at 1379. Plaintiffs' failure to appeal from the 1973 judgment (Trial Opinion) indicates that they accept the same as having eliminating discrimination from that point onward.

D. The District Court Properly Required Claimants to Prove Residence Within the Geographic Jurisdiction of the Union at the Time of Application.

Clearly, back pay may not be awarded to an individual who cannot demonstrate that he sought and was discriminatorily denied membership in the Union. One invaluable indication of an individual's availability to work within the Union's geographic jurisdiction is that individual's residence within said area.

The Supreme Court's decision in Albemarle, supra, is inapposite to the issue raised herein, since the Court did not reach the issue of an individual plaintiff's entitlement to back pay. 422 U.S. at 413. Under the circumstances involved herein, it cannot be argued that the district court's determination to utilize an objective standard in assessing back pay liability constituted an abuse of discretion. Cf. Thornton v. East Texas Motor Freight, supra; Rios v. Enterprise Association Steamfitters, Local 638, supra, 501 F.2d at 632; United States v. Lathers, Local 46, supra, 328 F.Supp. at 443.

E. The Requirement that a Claimant Prove he was Admitted to the A Branch or Qualified to be Admitted Under the Order of June 21, 1973 was Proper.

In addition to the requirements previously discussed, the district court ruled that each claimant be required to prove that:

> "He was admitted to the A Branch under the provisions of this Court's Orders of April 16, 1971, January 3, 1972 or June 21, 1973, or is qualified to be admitted under this Court's Orders of June 21, 1973." A-778.

Just as Title VII was not intended to guarantee a job to every minority regardless of his qualifications, see Griggs v. Duke Power Co., supra, it does not allow back pay recoveries to unqualified individuals. Meadows v. Ford Motor Co., 510 F.2d 939, 948 (6th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3594 (U.S. April 25, 1975) (No. 74-1349); E.E.O.C. v. Detroit Edison Co., supra; Mims v. Wilson, supra, 514 F.2d at 109, n.5; Cf. McDonnell Douglas Corp. v. Green, supra.

In requiring that claimant's prove that they were qualified for admission, the district court properly construed the requirements of Title VII.

F. The District Court Properly Required Proof of Actual Monetary Damages Resulting From the Denial of Admission to the Union, and Properly Required Deduction of Other Employment Income and Public Assistance.

Neither the Rios appellants nor the E.E.O.C. contest the need for the individual claimant to prove he sustained monetary damage as a result of his denial of admission to the Union. Nor do they challenge the deduction of other employment income received by the claimant during the relevant period. However, the Rios appellants (but not the E.E.O.C.) assert that a deduction of public assistance payments constitutes error by the district court. Brief for Appellant Rios at 48.

The case of N.L.R.B. v. Gullett Gin Co., 340 U.S. 361 (1951), cited by the Rios appellants in support of their contention, is clearly distinguishable from the instant situation. In Gullett Gin, supra, the Court specifically dealt with the question of whether the N.L.R.B. must deduct unemployment compensation from back pay awards. The Supreme Court ruled that the Board had the power to refuse to deduct unemployment compensation payments from a back pay award, 340 U.S. at 364, but the Court did not rule that the Board could not deduct unemployment compensation from a back pay award.

The instant case, however, raises the question of whether the district court's order that public assistance (i.e., welfare and unemployment insurance) payments be deducted constitutes an abuse of the equitable discretion granted the district court under 42 U.S.C. §2000e-5(g). Mindful that the Supreme Court in Albemarle, supra, was dealing with an absolute denial of back pay and not with the amount of back pay to be awarded an individual claimant, 422 U.S. 405, 413, we respectfully submit that the district court did not abuse its discretion in requiring a deduction of public assistance payments from the back pay computation. Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975).

Indeed, Congress has indicated its desire to avoid a windfall to individual claimants by requiring a deduction of interim earnings and/or amounts reasonably earnable. 42 U.S.C. §2000e-5(g).

As the Seventh Circuit stated in Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969):

> "The deduction of unemployment compensation was proper, being a valid exercise of the trial court's discretion pursuant to 42 U.S.C. §2000e-5(g)." 416 F.2d at 721.

Accord, Clairborne v. Illinois Central R.R., ____ F.Supp. ____, 11 FEP Cases 803 (E.D. La. 1974). Cf. Coyne v. Campbell, 11 N.Y. 2d 372 (1962).

G. The District Court Properly Determined that the Back Pay Period Should Commence on October 15, 1968.

The district court, in ruling upon the duration of the back pay period for which the Union was to be held liable, stated:

> "A person entitled to back pay may recover proven damages beginning on the date the discrimination occurred or beginning on October 15, 1968, which is two years prior to the filing of the complaint with E.E.O.C. by the Rios plaintiffs, whichever is later." Back Pay Opinion, 400 F.Supp. at 992; A-774 (citation omitted).

In so ruling, the district court relied upon both its inherent discretionary power and upon the March 14, 1972 amendment to Title VII, codefied at 42 U.S.C. §2000e-5(g), which states, in relevant part, that:

> "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the E.E.O.C." 42 U.S.C. §2000e-5(g).

While the Rios plaintiffs-appellants filed their action prior to the effective date of the 1972 provision, the district court properly chose to limit the back pay period in accordance with the intent of Congress in enacting the two-year limitation stating:

"This amendment has a bearing on Congressional intent as to the limitation to be imposed in granting back pay awards and will be applied here." Back Pay Opinion, 400 F.Supp. at 992; A-774.

Indeed, in discussing the above amendment, Senator Beall expressed this intent by stating:

"Should there be a finding in favor of the plaintiff in one of these cases, we want to be sure that the penalty is within the balance of fairness." Congressional Record, January 25, 1972 at S472.

While no express indication of Congressional intent exists with regard to the retroactive applicability of the two-year limitation, it is obvious that the enactment of the amendment does reflect a Congressional intent to realistically limit back pay liability. Given this intent, the district court did not commit reversible error in adopting the two-year limitation in the instant case. As was stated in Laffey v. Northwest Airlines, supra:

"[The 1972 amendment] does indicate that Congress felt some limitation is appropriate to avoid 'windfall' damage awards and to avoid harsh, and sometimes unbearable, economic burdens upon employers." 374 F.Supp. at 1390.

Under such circumstances, the utilization of the two-year limitation period was not clearly erroneous. The cases cited by appellants in support of their contention

that "subsequent enactment...must be disregarded", Brief for Appellant E.E.O.C. at 23 (emphasis added), did not reach the question of whether a district court may, in its equitable discretion, utilize a two-year limitation period. Moreover, appellants' contention is totally refuted by the well-settled rule that a court of equity may apply the law as it exists at the time of judgment as opposed to the time the action is filed. Lathan v. Brinegar, 506 F.2d 677, 687 (9th Cir. 1974); Cf. Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).

That the 1972 amendments to Title VII can be and indeed have been applied retroactively, see, e.g., Adams v. Brinegar, 521 F.2d 129 (7th Cir. 1975).

H. The Union is not Liable for any Back Pay Liability that may be Imposed Upon JAC.

While the Rios appellants correctly note that four of the eight members of the board of trustees of the Steamfitters Industry Educational Fund (the parent body of the JAC) are appointed by the Union, appellants have failed to demonstrate, beyond mere conclusory statements which are beyond support in fact, that the JAC is an agent of the Union. Indeed, appellants have simply overlooked the fact that the members of the board are trustees, not agents, as

shown by the Declaration of Trust under which the Steamfitters Industry Educational Fund was created.

The legal concept of an "agency" differs significantly from that of a trust. An agent acts for and on behalf of his principal, and is subject to his control. A trustee, on the other hand, acts for the benefit of the beneficiaries of the trust. Since the Union cannot be said to have control of the operations of the trust, the JAC cannot be held to be the agent of the Union. Restatement 2d, Agency, §14B; Restatement 2d, Trusts, §8; Scott on Trusts, §8 (3d ed. 1967).

Appellants have not and cannot point to anything in the record that demonstrates that the trustees of JAC work for or are subject to the Union's control. Indeed, the Union only has the power to appoint one-half of the trustees, yet a majority are required to transact the affairs of the trust. A-433. It is the trustees alone who determine the need for apprentices and the qualifications for admission into the program. A-434-435; Trial Opinion, 360 F.Supp. at 985-986; A-589.

Thus, the mere fact that the Union appoints one-half of the board members does not mean that the JAC is subject to the control of the Union. The trustees, acting for the benefit of the beneficiaries and in accordance with

the terms of a trust, can in no way be deemed agents of the Union.

Since appellants have failed to demonstrate that the day to day affairs of the Educational Fund are controlled by the Union, it is axiomatic that the JAC is not the agent of the Union and the Union is therefore not liable for the actions of the JAC.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to place common sense above abstract theory and hold that under the facts and circumstances peculiar to this case the continuation of the Union and of the Affirmative Action Program will effectuate the central purpose of Title VII more than an award of back pay.

Respectfully submitted,

DELSON & GORDON
Attorneys for Defendant-Appellee
Enterprise Association
Steamfitters Local 638 of U.A.

Richard Brook,
Of Counsel.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Robert La Grasse, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd Maspeth, N.Y.

That on the 2nd day of April, 1976, deponent personally served the within Brief for Defendant-Appellee Enterprise Association Steamfitters Local 638 of U.A. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

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Sworn to before me this
2nd day of April, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977